U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-L-E- CORP

DATE: FEB. 9, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an electrical contractor, seeks to permanently employ the beneficiary in the United States as a quality control analyst. The petitioner requests classification of the beneficiary as an advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). Jobs in the advanced degree professional immigrant visa classification require at least an advanced degree or a foreign equivalent degree.

The Director, Texas Service Center, denied the petition. The Director determined that the Beneficiary did not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act, or meet the minimum requirements on the labor certification to qualify for the job offered. Additionally, the Director determined that the Petitioner did not establish its ability to pay the proffered wage from the priority date and continuing to the present.

The matter is now before us on appeal. The Petitioner asserts that the Beneficiary attained the foreign equivalent of a U.S. master's degree and meets the minimum requirements of the offered position as stated on the labor certification. The Petitioner further asserts that it has the continuing ability to pay the proffered wage.

We conduct *de novo* review of all issues involving the application of law, policy, and discretion to the facts of a case. *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is July 13, 2012.[2]

[1] *See* INA § 212(a)(5)(D), 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree.
H.4-B. Major field of study: Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

Part J of the labor certification states that the Beneficiary possesses a master's degree in computer science from Poland, completed in 2003. The record contains a copy of the Beneficiary's dyplom tytul magister inzynier in computer science (with an apparent focus on information systems), from Poland. The record also contains a dyplom licencjata in economics from the Poland awarded to the Beneficiary in 2002.

The record also contains an evaluation of the Beneficiary's educational credentials prepared by on February 20, 2014. This evaluation discusses the Beneficiary's high school diploma and diploma from It does not reference the Beneficiary's education at the The evaluation states that the Beneficiary has the equivalent of a combined Bachelor and Master of Science degree in Computer Engineering from a regionally accredited education institution in the United States. The evaluation does not indicate by whom it was prepared, nor does it include the credentials of the individual who prepared it.

The record contains two additional evaluations performed by Professor for the on May 23, 2014 and January 29, 2015.[3] Professor states that the Beneficiary's licencjata from the is the "equivalent of not less than three years of academic studies toward a Bachelor's Degree at an accredited US college or university." Professor further states that the Beneficiary's magistra inzyniera from is "equivalent to the completion of five years of bachelor's- and master's-level studies at an accredited US university, and satisfies the requirements in the United States for a master's-level degree equivalence in the field of Computer Science."

[3] On appeal, the Petitioner submitted an "Acknowledgement of Error in Prior Evaluation" from the dated January 29, 2015. The acknowledgement indicates that a correction was made to the date of award of the Beneficiary's licenjata. Therefore, we will consider the January 29, 2015, evaluation from to supersede the original May 23, 2014 evaluation in this appeal.

U.S. Citizenship and Immigration Services (USCIS) uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron Intl, Inc*, 19 I&N Dec. 791 (Comm'r 1988); *see also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The Director stated in his denial that there appeared to be discrepancies in the documentation of the Beneficiary's education at the [redacted] and [redacted] in that the dates of attendance at both universities for separate programs from 1998 to 2003 appeared to overlap. On appeal, the Petitioner asserts that the Beneficiary attended the [redacted] "extramurally, on weekends and other days off, from October of 1998 to April 2002, nearly at the same time as the pursuit of the Master's in Computer Science degree at [redacted]" The Petitioner further asserts that the Beneficiary began a separate master's degree program in economics at the [redacted] but did not complete that program.

Despite the inclusion of evidence of the Beneficiary's studies at the [redacted] the Petitioner asserts on appeal that it has always been its contention "that the sole qualification of the beneficiary is his five-year 'Magistra Inzyniera' in Computer Science degree from the [redacted] in Poland, awarded on July 3, 2003."

In our notice of intent to dismiss (NOID) dated July 2, 2015, we notified the Petitioner that we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Federal courts consider EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4]

[4] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degrees were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's

According to EDGE, a dyplom licencjata is comparable to three years of post-secondary education in the United States. A dyplom tytul magister inzynier is comparable to a bachelor's degree from a United States college or university. Nothing in EDGE suggests that a combined dyplom licencjata and a dyplom tytul magister inzynier is the equivalent of a master's degree from an accredited college or university in the United States. A copy of the EDGE credential advice was provided to the Petitioner.

In our NOID, we also noted that, although the Petitioner asserted that the Beneficiary attended the [redacted] "extramurally," we were unable to verify that the [redacted] offered a distance learning program for the economics program. We requested that the Petitioner submit evidence that the Beneficiary's economics program was available through distance learning to resolve the discrepancies noted in the Director's decision.

Our NOID additionally requested additional evidence of the Petitioner's ability to pay the proffered wage. Specifically, we requested that the Petitioner provide evidence of its ability to pay the proffered wage to the instant Beneficiary, as well as the beneficiary of another petition that it had filed.

In response to our NOID, the Petitioner submitted a letter from its counsel and a copy of the original brief submitted in support of the appeal. No additional evidence was submitted. In his letter, counsel again asserts that "the beneficiary earned a stationary Master's degree in Computer Science, a sole qualification and claim for the EB-2 I-140." Counsel also asserts that the Beneficiary's studies for his bachelor's degree in economics "occurred entirely in [redacted]" Counsel states that the Petitioner's ability to pay the proffered wage was addressed in its brief submitted in support of the appeal.

II. LAW AND ANALYSIS

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

---

degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the beneficiary are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[5] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> . . . .
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C.

[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Id. at 1009. (Emphasis added.) The Ninth Circuit revisited this issue, stating:

> [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Haw, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

B. Eligibility for the Classification Sought

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Here, the terms of the labor certification require an actual master's degree, and do not allow for substitution of a bachelor's degree and five years of post-baccalaureate progressive experience.

The record does not establish the Beneficiary's qualifications as an advanced degree professional. The evaluations submitted by the Petitioner state the equivalency of the Beneficiary's studies at the [redacted] to a U.S. master of science degree. However, the record indicates his completion of only five years of studies at the university. U.S. master's degrees generally require

six years of university-level study. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977) (finding that U.S. bachelor's degrees usually require at least four years of university level studies).

Professor evaluation cites EDGE as a reference. However, as previously indicated, EDGE reports that a dyplom tytul magister inzynier is comparable to only a bachelor's degree in the United States. The record does not explain why Professor Appel's conclusion differs from that of EDGE. *See Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In response to our NOID, counsel asserts that EDGE is "universally considered to be unreliable, full of errors and biased." However, counsel's assertions do not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that counsel's unsupported assertions do not establish facts of record). The record lacks evidence to support counsel's statements. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding unsupported assertions insufficient to meet the burden of proof in visa petition proceedings).

As previously indicated, federal courts have found EDGE to be a reliable, peer-reviewed source of information about foreign education equivalencies. *See, e.g., Viraj*, 578 Fed. Appx. at *909-10 (upholding USCIS' finding that a beneficiary with five years of foreign university studies did not possess an advanced degree and describing EDGE as "a respected source of information"). In addition, by attacking EDGE, counsel also attacks the reliability of the evaluation he submitted from Professor which cites EDGE.

The record establishes the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree. However, the record does not indicate the Beneficiary's possession of the equivalent of an advanced degree through an additional five years of progressive, post-baccalaureate experience in the specialty. The labor certification states the Petitioner's employment of the Beneficiary as a senior estimator from October 1, 2010, until the petition's priority date of July 13, 2012. However, this experience totals less than five years. Also, the job duties of the position of senior estimator stated on the labor certification do not establish the employment to be in the specialty. The labor certification does not state any other experience of the Beneficiary.

After reviewing all of the evidence in the record, it is concluded that the Petitioner has not established that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act and we will dismiss the appeal.

C. The Minimum Requirements of the Offered Position

A petitioner must also establish that the beneficiary satisfied all of the education, training, experience and any other requirements of the offered position by the petition's priority date. 8

C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine the minimum requirements of the offered position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

In the instant case, the labor certification states that the offered position requires a master's degree, and that experience will not substitute for education. Even if the record demonstrated the Beneficiary's possession of the equivalent of a U.S. master's degree, the record does not establish his education in the required field of study. The labor certification requires a master's degree in computer science and indicates that no other field of study is acceptable. However, the evaluation by states the Beneficiary's possession of the equivalent of a U.S. master's degree in *computer engineering*. *See Ho,* 19 I&N Dec. at 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In addition, the record does not explain how the Beneficiary gained a diploma from the while simultaneously studying at the Counsel asserts the Beneficiary's pursuit of the diploma from the "extramurally, on weekends and other days off." However, counsel's assertions do not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

For the reasons explained above, the Petitioner has not established that the Beneficiary possesses the equivalent of a United States master's degree or a degree in the required field of study of computer science.

The Petitioner did not establish that the Beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

D. The Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the petition's priority date is July 13, 2012. The proffered wage as stated on the ETA Form 9089 is $82,014 per year.

The record shows that the Petitioner is structured as a C corporation. On the petition, the Petitioner claimed to have been established in , to have a gross annual income of more than $8 million, and to employ 50 workers. According to the tax returns in the record, the Petitioner's fiscal year is from September 1 to August 31. On the ETA Form 9089, signed by the Beneficiary on March 12, 2014, the Beneficiary claimed to have worked for the Petitioner since 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Petitioner has submitted Forms W-2 that it issued to the Beneficiary in 2013 and 2014, demonstrating that it paid the Beneficiary $49,792 and $47,393, respectively, in those years. The Petitioner must demonstrate that it has the ability to pay the full proffered wage in 2012, and the difference between the wages paid to the Beneficiary in 2013 ($32,222) and 2014 ($34,621).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> [T]he AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record before the Director closed on July 21, 2014, with the receipt by the Director of the Petitioner's submissions in response to the Director's request for evidence. As of that date, the Petitioner's 2013-2014 federal income tax return was not yet available. On appeal, the Petitioner submits its 2013-2014 federal tax return. The Petitioner's tax returns demonstrate its net income, as shown in the table below.

- In 2012-2013, the Form 1120 stated net income of $357,936.
- In 2013-2014, the Form 1120 stated net income of $145,161.

Therefore, for the fiscal years 2012-2013 and 2013-2014, the Petitioner's net income was more than the proffered wage. The Petitioner, therefore, demonstrated its ability to pay the Beneficiary's individual proffered wage based on its net income and net current assets.

However, as noted in our NOID, according to USCIS records, the petitioner has filed at least one other I-140 petition on behalf of another beneficiary that remained pending before the instant petition's priority date. A petitioner must establish its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). *See also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

The evidence in the record does not document the priority date, proffered wage or wages paid to the other beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its

discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner has been in business since The tax returns in the record indicate declining gross revenues and wages paid in 2013 - 2014. Unlike in *Sonegawa*, the record does not indicate any uncharacteristic losses or expenditures or the Petitioner's outstanding reputation in its field. Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries and did not provide requested information regarding its other pending petition. Thus, we are precluded from determining the Petitioner's ability to pay the proffered wage to all of its sponsored beneficiaries. Additional evidence regarding the Petitioner's other beneficiaries must be submitted with any further filings.

The evidence submitted does not establish that the Petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

III. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. The record also does not establish the Petitioner's ability to pay the proffered wage. Therefore, the Beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The Director's decision denying the petition is affirmed.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-L-E- Corp*, ID# 13808 (AAO Feb. 9, 2016)